



DEPARTMENT OF AGRICULTURE

Farm Service Agency

Notice of Funds Availability; Spot Market Hog Pandemic Program (SMHPP)

[Docket ID FSA–2021–0012]

AGENCY: Farm Service Agency, USDA.

ACTION: Notification of funding availability.

SUMMARY: The Farm Service Agency (FSA) published a notice on December 14, 2021, announcing the availability of \$50 million for the Spot Market Hog Pandemic Program (SMHPP). This document clarifies hog eligibility, documentation requirements, and payment factoring. SMHPP assists producers who sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period during which these producers faced the greatest reduction in market prices due to the COVID-19 pandemic. SMHPP excludes non-adult pigs or other swine that were not intended for slaughter. SMHPP also excludes hogs sold under contracts that had a premium or other formula outside a spot market sale. The eligibility requirements, payment calculation, and application procedure for SMHPP are included in this notice.

DATES: *Funding availability:* Implementation will begin [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kimberly Graham; telephone: (202) 720–6825; email: Kimberly.Graham@usda.gov. Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice) or 844-433-2774 (toll-free nationwide).

SUPPLEMENTARY INFORMATION:

Revision and Clarification

FSA published the initial notice on December 14, 2021 (86 FR 71003 - 71007), which announced the availability of \$50 million for SMHPP. In response to stakeholder concerns and additional USDA analysis, USDA is issuing this document to clarify hog eligibility, documentation requirements, and payment factoring. Other provisions of the initial notice remain unchanged. This document provides these clarifications by incorporating the changes into the text from the prior notice, starting with the Background section below. This section explains the clarifications and revisions.

Based upon review and stakeholder feedback, USDA is revising SMHPP eligibility to better target the effectiveness of SMHPP. As a result, this document revises eligible spot market sales to include additional negotiated sales, and third-party intermediary sales as defined in this NOFA. When the COVID-19 pandemic disrupted normal marketing channels, producers sold their hogs either directly or through third-party intermediaries to local processors, butchers, individuals, brokers, sale barns, or livestock aggregators. The use of third-party intermediaries was the only available marketing alternative for many producers when access to packers was not feasible due to the pandemic and they used these sales avenues rather than depopulation; therefore, these sales alternatives are included in SMHPP. The only sales directly to packers that are eligible remain those through a negotiated sale. Hogs sold through a contract that includes a premium of the spot-market price or other formula such as the wholesale cut-out price remain ineligible. This document also clarifies that eligible hogs:

- Do not include immature swine (that is, pigs), and
- Must be suitable and intended for slaughter as determined by USDA.

FSA became aware that some producers were confused about the eligibility of sales and what information they needed to submit when compared to what they had

submitted for previous pandemic assistance. Therefore, FSA is requiring that all producers provide verifiable or reliable documentation of their eligibility of sales to ensure SMHPP payment eligibility and to prevent erroneous payments.

To ensure SMHPP funding availability is disbursed equitably to all eligible producers, FSA will issue payments after the application period ends. If calculated payments exceed the amount of available funding, payments will be factored.

As a result of these revisions, the SMHPP application period has been extended to April 29, 2022.

Background

The Coronavirus Aid, Relief, Economic Security (CARES) Act (Pub. L. 116-136) provides funding to prevent, prepare for, and respond to the COVID-19 pandemic by providing support for agricultural producers who were impacted. The Secretary announced the USDA Pandemic Assistance for Producers initiative on March 24, 2021. As a part of that initiative, FSA implemented SMHPP, as directed by the Secretary, to make payments to producers that sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period in which these producers faced the greatest reduction in market prices due to the COVID-19 pandemic.

FSA and USDA's Agricultural Marketing Service (AMS) identified negotiated hogs as a sector of the agricultural industry significantly impacted by the pandemic that had not been adequately addressed by previous pandemic relief programs and experienced the greatest market price impacts out of all hog purchase types. Using a price analysis of the average daily national negotiated sales during the pandemic compared to the daily 5-year average for years 2015 through 2019. FSA and AMS determined April 16, 2020, through September 1, 2020, to be the period with the greatest market impacts on hogs sold through a negotiated sale due to the pandemic. The reduced market prices were a result of fewer negotiated hogs being procured, packer production

decreases due to employee illness, and supply chain issues. This period also generally aligns with the Coronavirus Food Assistance Program (CFAP) 2 eligibility period for swine, which ran from April 16, 2020, through August 31, 2020.

When the COVID-19 pandemic disrupted normal marketing channels, including access to packers, producers sold their hogs through cash sales to local processors or butchers, direct sales to individuals, and third-party intermediaries which, may include, but are not limited to, sale barns or brokers. The use of third-party intermediaries was the only available marketing alternative for many producers and they used these sales avenues rather than depopulation; therefore, these sales alternatives are included in SMHPP.

Direct payments are limited to hog producers located in the United States. This assistance will be available to hog producers through SMHPP as provided in this notice.

FSA is administering SMHPP under the general supervision and direction of the FSA Administrator and AMS. AMS is providing technical assistance to FSA, which includes, but is not limited to, sharing expertise on the hog industry regarding the impact of the COVID-19 pandemic on the industry.

Definitions

The definitions in 7 CFR parts 718 and 1400 apply to SMHPP, except as otherwise provided in this document. The following definitions also apply.

Contract grower means a person or legal entity who grows or produces eligible livestock under contract for or on behalf of another person or entity. The contract grower's income is dependent upon the successful production of livestock or offspring from livestock. The contract grower does not have ownership in the livestock and is not entitled to a share from sales proceeds of the livestock.

Hogs means adult swine of an appropriate size and condition for slaughter as evidenced by sale and acceptance for slaughter, if determined to be reasonable for the

size for slaughter for the area from April 16, 2020, through September 1, 2020, by the applicable FSA county committee.

Negotiated sale means a sale by a producer of hogs to a packer under which the base price for the hogs is determined by seller-buyer interaction and agreement on a delivery day. The hogs are scheduled for delivery to the packer not more than 14 days after the date on which the hogs are committed to the packer. A negotiated formula sale is also considered a negotiated sale.

Negotiated formula sale means a hog or pork market formula sale under which:

- (1) The formula is determined by negotiation on a lot-by-lot basis; and
- (2) The hogs are scheduled for delivery to the packer not later than 14 days after the date on which the formula is negotiated and the hogs are committed to the packer.

Ownership interest means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering SMHPP, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is considered to have a beneficial ownership interest in such legal entity.

Packer means a packer as defined in section 201 of the Packers and Stockyards Act, 1921 (7 U.S.C. 191). Therefore, packer means any person engaged in the business:

- (a) Of buying livestock in commerce for purposes of slaughter;
- (b) Of manufacturing or preparing meats or meat food products for sale or shipment in commerce; or
- (c) Of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

Pig an immature, non-adult swine weighing less than 120 pounds.

Producer means a person or legal entity who has ownership of the hogs and whose production and facilities are located in the United States.

Reliable record means any non-verifiable record available that can reasonably be used to substantiate the eligible hog sales and how prices were determined for the sale, as determined acceptable by the FSA county committee.

Sold means the producer and the buyer agreed on the negotiated price through a spot market sale, and the producer delivered the hogs within the time of that agreement. For SMHPP, a hog is considered sold on the date of the agreement, rather than when the hog or payment is delivered.

Spot market sale means hogs marketed for slaughter to an individual or through a negotiated sale or through an intermediary who interacts with the buyer on behalf of the seller, which may include, but is not limited to, sale barns, brokers, or other intermediaries as determined by DAFP.

Swine means domesticated omnivorous pig, hog, or boar.

United States means all 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any other territory or possession of the United States.

Verifiable record means a document provided by the producer that can be verified by the FSA county committee through an independent source and can be used to substantiate the eligible hog sales and how prices were determined for the sale.

Eligible Hog Sales

Eligible hogs are hogs sold through a spot market sale by producers from April 16, 2020, through September 1, 2020. FSA is providing assistance for these sales because USDA has determined producers that sold hogs through a spot market sale were

affected by the greatest reduction in market prices for swine producers due to the COVID-19 pandemic during this period.

The hogs must have been physically located in the United States at the time of sale and advertised or offered as ready for slaughter.

Ineligible Hog Sales

Ineligible hog sales include:

(1) Any other types of sales identified by the AMS Livestock Mandatory Reporting (LMR), including:
formulas linked to futures or formulas based on the cutout based on the wholesale meat prices, such as other market formula and swine or pork market formula,

- Packer-owned swine.

(2) Contracts that include a premium above the spot market price; and

(3) Sales of either pigs or hogs that are marketed for purposes other than slaughter, such as for breeding stock or to grow out.

Eligible Producers

An eligible producer is a person or legal entity who has ownership of the eligible hogs and whose production and facilities are in the United States.

To be eligible for SMHPP, a producer must be any of the following:

(1) Citizen of the United States;

(2) Resident alien, which for purposes of this subpart means “lawful alien” as defined in 7 CFR part 1400;

(3) Partnership of citizens or resident aliens of the United States;

(4) Corporation, limited liability company, or other organizational structure organized under State law solely owned by U.S. citizens or resident aliens; or

(5) Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

Eligible producers must have sold the hogs through a spot market sale during the time frame of April 16, 2020, through September 1, 2020.

Ineligible Producers

Ineligible producers include:

- (1) Contract growers;
- (2) Federal, State, and local governments, including public schools; and
- (3) Packers.

Application Process

FSA will accept applications from December 15, 2021, through April 29, 2022. To apply for SMHPP, eligible producers must submit a complete form FSA-940, Spot Market Hog Pandemic Program (SMHPP) Application. Applications may be submitted to any FSA county office in person or by mail, e-mail, facsimile, or other methods announced by FSA.

Producers must also submit all the following items, if not previously filed with FSA:

- Form AD-2047, Customer Data Worksheet for new customers or existing customers needing to update their customer profile;
- Form CCC-902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;
- Form CCC-901, Member Information for Legal Entities (if applicable);
- Form CCC-941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information, for the 2020 program year for the person or legal entity, including the legal entity's members, partners, shareholders, heirs, or beneficiaries as provided in 7 CFR part 1400;
- Form FSA-1123, Certification of 2020 Adjusted Gross Income, if applicable; and

- A highly erodible land conservation (sometimes referred to as HELC) and wetland conservation certification as provided in 7 CFR part 12 (form AD-1026 Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification for the SMHPP producer and applicable affiliates.

Producers must submit all required eligibility documentation specified above, as applicable, no later than 60 days from the date a producer signs and submits the form FSA-940. If the producer does not timely submit the required eligibility forms, or a member who is required to submit the form AD-1026 does not do so, FSA will not issue a payment. When the other required eligibility forms are not timely submitted for a member of a legal entity, FSA will reduce the payment based on the member's ownership interest in the legal entity.

All producers must provide documentation to support the accuracy of information provided on the application, including to substantiate the number of hogs reported on the application that were sold through a spot market sale and how the price was determined for the sale. The supporting documentation must be verifiable or reliable records that substantiate the reported number of hogs sold through a spot market sale and how the price was determined for the sale. Producers who apply for SMHPP after the publication of this document are required to submit supporting documentation to FSA within 15 days from submitting the FSA-940 to FSA or the application will be disapproved. For producers who applied for SMHPP prior to the publication of this document, FSA will notify producers and request supporting documentation to verify the sales of hogs sold through a spot market sale. The documentation must be submitted to FSA within 30 days from the request or the application will be disapproved by FSA.

Payment

SMHPP payments compensate eligible hog producers for hogs sold through a spot market sale from April 16, 2020, through September 1, 2020. To simplify administration of SMHPP, FSA and AMS have determined a single payment rate of \$54 per head.

USDA calculated the average daily difference in the negotiated sales price during the applicable time frame, compared to the daily 5-year average for negotiated sales prices during April 16 through September 1 for years 2015 through 2019. The average daily difference was equal to \$77 per hog based on the average carcass weight that was submitted to AMS through livestock mandatory reporting.

The SMHPP payment rate of \$54 per head is equal to the \$77 per head minus the CFAP 2 rate of \$23 per head. CFAP 2 paid for the highest hog inventory from April 16, 2020, through August 31, 2020. CFAP 2 was available to all swine producers who qualified under the terms and conditions of such program and the application period for CFAP 2 was extended, ending October 12, 2021, to allow additional time for all eligible producers to apply. SMHPP is therefore not intended to cover pandemic impacts that were or could have been compensated under CFAP 2; accordingly, the CFAP 2 hog payment rate of \$23 per head has been deducted from the calculated payment rate for SMHPP.

SMHPP payments will be calculated by multiplying the number of head of eligible hogs, not to exceed 10,000 head, by the payment rate per head of \$54. FSA will issue payments to eligible producers after the application period ends. If calculated payments exceed the amount of available funding, payments will be factored. SMHPP is not subject to payment limitations.

Provisions Requiring Refund to FSA

In the event that any application for a SMHPP payment resulted from erroneous information reported by the producer, the payment will be recalculated, and the producer

must refund any excess payment to FSA, including interest to be calculated from the date of the disbursement to the SMHPP producer. If, for whatever reason, FSA determines that the producer misrepresented the total hogs sold through a spot market sale, the application will be disapproved, and the producer must refund the full SMHPP payment to FSA with interest from the date of disbursement. Any required refunds must be resolved in accordance with 7 CFR part 3.

Miscellaneous Provisions

A person or legal entity, other than a joint venture or general partnership, is ineligible for SMHPP payments if the person's or legal entity's average adjusted gross income (AGI), using the average of the adjusted gross incomes for the 2016, 2017, and 2018 tax years, exceeds \$900,000 as described in 7 CFR part 1400, subpart F, unless the exception described below applies. With respect to joint ventures and general partnerships, this average AGI provision will be applied to members of the joint venture and general partnership. Average AGI provisions are applicable to members, partners, stockholders, heirs, and beneficiaries with an ownership interest in a legal entity, including a general partnership or joint venture who are at or above the fourth level of ownership in the business structure. The eligible hog producer's payment will be reduced by the portion of a payment attributed to a member who exceeds the average \$900,000 AGI limitation or is otherwise ineligible for payment.

A person or legal entity whose average AGI exceeds \$900,000 may otherwise be eligible for SMHPP payments if the 2020 AGI alone is less than \$900,000. In order to qualify for this exception to the average AGI limitation, persons or legal entities must submit form FSA-1123 to certify that their 2020 AGI is not more than \$900,000 and also provide a certification from a licensed CPA or attorney attesting to the accuracy of the person's or legal entity's certification.

A payment made to a legal entity will be attributed to those members who have a direct or indirect ownership interest in the legal entity unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility.

Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

- First level of ownership: Any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-level or payment legal entity;
- Second level of ownership: Any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;
- Third and fourth levels of ownership: Except as provided in the second-level of ownership bullet above, any payments made to a legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in the second-level of ownership bullet above; and
- Fourth level of ownership: If the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that

represents the indirect ownership in the first-level or payment legal entity by the fourth level legal entity.

Payments made directly or indirectly to a person who is a minor child will not be combined with the earnings of the minor's parent or legal guardian.

A producer that is a legal entity must provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members holding an ownership interest in the legal entity. Payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest, at or above the fourth level of ownership in the business structure, is not provided to USDA.

If an individual or legal entity is not eligible to receive SMHPP payments due to the individual or legal entity failing to satisfy some other payment eligibility provision such as AGI or conservation compliance provisions, the payment made either directly or indirectly to the individual or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible individual or ineligible legal entity.

General requirements that apply to other FSA-administered commodity programs also apply to SMHPP, including compliance with the provisions of 7 CFR part 12, "Highly Erodible Land and Wetland Conservation," and the provisions of 7 CFR 718.6, which address ineligibility for benefits for offenses involving controlled substances. Appeal regulations specified in 7 CFR parts 11 and 780 and equitable relief and finality provisions specified in 7 CFR part 718, subpart D, apply to determinations under SMHPP. The determination of matters of general applicability that are not in response to, or result from, an individual set of facts in an individual participant's application for payment are not matters that can be appealed. Such matters of general applicability

include, but are not limited to, the determination of the applicable time period for eligible spot market sales and the payment rate for SMHPP.

Participants are required to retain documentation in support of their application for 3 years after the date of approval. Participants receiving SMHPP payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

A producer may file an application with an FSA county office after the SMHPP application deadline, and in such case the application will be considered a request to waive the deadline. The Deputy Administrator for Farm Programs, FSA (Deputy Administrator), has the discretion and authority to consider the case and waive or modify application deadlines and other requirements or program provisions not specified in law, in cases where the Deputy Administrator determines it is equitable to do so and where the Deputy Administrator finds that the lateness or failure to meet such other requirements or program provisions do not adversely affect the operation of SMHPP. Although producers have a right to a decision on whether they filed applications by the deadline or not, producers have no right to a decision in response to a request to waive or modify deadlines or program provisions. The Deputy Administrator's refusal to exercise discretion to consider the request will not be considered an adverse decision and is, by itself, not appealable.

Any payment under SMHPP will be made without regard to questions of title under State law and without regard to any claim or lien. The regulations governing offsets in 7 CFR part 3 apply to SMHPP payments.

In either applying for or participating in SMHPP, or both, the producer is subject to laws against perjury and any penalties and prosecution resulting therefrom, with such laws including, but not limited to, 18 U.S.C. 1621. If the producer knowingly makes any untrue verbal or written declaration, certification, statement, or verification that the producer when applying for or participating in SMHPP, or both, then the producer is guilty of perjury (except as otherwise provided by law) and may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or outside the United States.

For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under SMHPP but only as to beneficiaries who, as a condition of the waiver, agree to apply the SMHPP payments to reduce the amount of the judgment lien.

In addition to any other Federal laws that apply to SMHPP, the following laws apply: 15 U.S.C. 714; and 18 U.S.C. 286, 287, 371, and 1001.

Paperwork Reduction Act Requirements

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), FSA received the OMB approval (control number 0560-0305) to cover the SMHPP information collection request under the emergency request. FSA will include the increased burden hours of 4,152 to cover the additional documentation required to support the completed form FSA-940 SMHPP application in the 3-year approval.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321- 4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

As previously stated, SMHPP is providing payments to producers that sold hogs through a spot market sale from April 16, 2020, through September 1, 2020, the period in which these producers faced the greatest reduction in market prices due to the COVID-19 pandemic. The limited discretionary aspects of SMHPP do not have the potential to impact the human environment as they are administrative. Accordingly, these discretionary aspects are covered by the FSA Categorical Exclusions specified in 7 CFR 799.31(b)(6)(iv) that applies to individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) that applies to safety net programs.

No Extraordinary Circumstances (§ 799.33) exist. As such, the implementation of SMHPP and the participation in SMHPP do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this action and this document serves as documentation of the programmatic environmental compliance decision for this federal action.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which this document applies is 10.144 – Spot Market Hog Pandemic Program.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status,

family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720-2600 or 844-433-2774 (toll-free nationwide). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410 or email: OAC@usda.gov.

USDA is an equal opportunity provider, employer, and lender.

Zach Ducheneaux,
Administrator,
Farm Service Agency.

[FR Doc. 2022-05672 Filed: 3/17/2022 8:45 am; Publication Date: 3/18/2022]